UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

16 CV 9816

Anthony Campbell #16-A-4150

Write the full name of each plaintiff.

No. ______________
(To be filled out by Clerk's Office)

-against-

State of New York Board of Examiners of Sex Offenders, Sex Offender Registry Board, Sex Offender Registration Act

Write the full name of each defendant. If you cannot fit the names of all of the defendants in the space provided, please write "see attached" in the space above and attach an additional sheet of paper with the full list of names. The names listed above must be identical to those contained in Section IV.

COMPLAINT
(Prisoner)

Do you want a jury trial?
☑ Yes ☐ No

RECEIVED
SDNY PRO SE OFFICE
2016 DEC 19 AM 11:07
S.D. OF N.Y.

NOTICE

The public can access electronic court files. For privacy and security reasons, papers filed with the court should therefore *not* contain: an individual's full social security number or full birth date; the full name of a person known to be a minor; or a complete financial account number. A filing may include *only*: the last four digits of a social security number; the year of an individual's birth; a minor's initials; and the last four digits of a financial account number. See Federal Rule of Civil Procedure 5.2.

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I. LEGAL BASIS FOR CLAIM

State below the federal legal basis for your claim, if known. This form is designed primarily for prisoners challenging the constitutionality of their conditions of confinement; those claims are often brought under 42 U.S.C. § 1983 (against state, county, or municipal defendants) or in a "*Bivens*" action (against federal defendants).

☑ Violation of my federal constitutional rights

☐ Other: ______________________

II. PLAINTIFF INFORMATION

Each plaintiff must provide the following information. Attach additional pages if necessary.

Anthony | | Campbell
First Name | Middle Initial | Last Name

____

State any other names (or different forms of your name) you have ever used, including any name you have used in previously filing a lawsuit.

16A4150, NYSID #05961612m

Prisoner ID # (if you have previously been in another agency's custody, please specify each agency and the ID number (such as your DIN or NYSID) under which you were held)

Bare Hill Correctional Facility

Current Place of Detention

Caller Box 20, 181 Brand Road

Institutional Address

Malone | New York | 12953
County, City | State | Zip Code

III. PRISONER STATUS

Indicate below whether you are a prisoner or other confined person:

☐ Pretrial detainee
☐ Civilly committed detainee
☐ Immigration detainee
☑ Convicted and sentenced prisoner
☐ Other: ______________________

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IV. DEFENDANT INFORMATION

To the best of your ability, provide the following information for each defendant. If the correct information is not provided, it could delay or prevent service of the complaint on the defendant. Make sure that the defendants listed below are identical to those listed in the caption. Attach additional pages as necessary.

Defendant 1: Sex Offender Registry Board
First Name Last Name Shield #

Current Job Title (or other identifying information)

Current Work Address

New York N.Y.
County, City State Zip Code

Defendant 2: State of New York Board of Examiners
First Name Last Name Shield #

of Sex Offenders
Current Job Title (or other identifying information)

Current Work Address

Albany N.Y.
County, City State Zip Code

Defendant 3: Offender Sex Registration Act
First Name Last Name Shield #

Current Job Title (or other identifying information)

Current Work Address

Albany N.Y.
County, City State Zip Code

Defendant 4: Sex Offenders Risk level Assessment
First Name Last Name Shield #

Current Job Title (or other identifying information)

Current Work Address

Albany N.Y.
County, City State Zip Code

V. STATEMENT OF CLAIM

Place(s) of occurrence: New York State

Date(s) of occurrence: 12·3·2016

FACTS:

State here briefly the FACTS that support your case. Describe what happened, how you were harmed, and how each defendant was personally involved in the alleged wrongful actions. Attach additional pages as necessary.

On 7·17·2003, I, Anthony Campbell Pleaded Guilty To Misdemeanor Sexual Battery (18.2-67.4) an Offense in The State Of Virgina, City of Chesapeake and was Sentence To 12 month imposed And 12 months Suspended (No Registration Required). On 6·17·2008 In The State Of New Jersey, City of Trenton I was Illegally force To Register as A Sex Offender By The New Jersey DePartment Of Parole As A condition of my Parole for my Conviction of Said misdemeanor offense of Sexual Battery for whitch Registration was not Required. After Completing my Condition of Parole ("maxing out") I move to Harrisburg, Pennsylvania on 12·07·2009. On 10·06·2010 I was Arrested on A Warrent from Atlantic City, New Jersey for "Failure To Register As A Sex Offender (ML Reg) under Megan's Law Registration Act. I was held for 97 days in Atlantic County Jail in Mays Landing, New Jersey. Upon my Release I was told that I would have To Register As

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A Sex Offender by the Atlantic County Prosecuter Office or I would be re-arrested. I move To The County of the Bronx of The State of New York on 8.01.2012 an Registered with The New York Police Department Located At 100 Center Street and was Told my Status is Pending Review By New York State Board of Examiners of Sex Offenders and was Giving a Sex Offenders Risk level Assessment #55. My SORA Case WAS (Attached A)

INJURIES:

If you were injured as a result of these actions, describe your injuries and what medical treatment, if any, you required and received.

False Imprisonment, Pain and Suffering, Loss Wages, Mental Stress.

VI. RELIEF

State briefly what money damages or other relief you want the court to order.

To Be Remove from the Megen Law's Registration list. Clear my Rap Sheet of Related Charges, 8,000,000.00 (eight million) in monentary composation.

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VII. PLAINTIFF'S CERTIFICATION AND WARNINGS

By signing below, I certify to the best of my knowledge, information, and belief that: (1) the complaint is not being presented for an improper purpose (such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation); (2) the claims are supported by existing law or by a nonfrivolous argument to change existing law; (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and (4) the complaint otherwise complies with the requirements of Federal Rule of Civil Procedure 11.

I understand that if I file three or more cases while I am a prisoner that are dismissed as frivolous, malicious, or for failure to state a claim, I may be denied *in forma pauperis* status in future cases.

I also understand that prisoners must exhaust administrative procedures before filing an action in federal court about prison conditions, 42 U.S.C. § 1997e(a), and that my case may be dismissed if I have not exhausted administrative remedies as required.

I agree to provide the Clerk's Office with any changes to my address. I understand that my failure to keep a current address on file with the Clerk's Office may result in the dismissal of my case.

Each Plaintiff must sign and date the complaint. Attach additional pages if necessary. If seeking to proceed without prepayment of fees, each plaintiff must also submit an IFP application.

12·03·2016 — Dated

[signature] — Plaintiff's Signature

Anthony — First Name

Middle Initial

Campbell #16A4150 — Last Name

BareHill C.F. Caller Box 20, 181 Brand Rd. — Prison Address

Malone — County, City

New York — State

12953 — Zip Code

Date on which I am delivering this complaint to prison authorities for mailing: 12·9·2016

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United States District Court
Southern District of New York

A Manual for Litigants Appearing Pro Se Before the United States District Court for the Southern District of New York

The Manual for Pro Se Litigants is available on the Court's website at http://nysd.uscourts.gov/ under Forms/Pro Se. The Manual is in PDF format (you will need Adobe Acrobat or another PDF reader to open it). We strongly recommend that *pro se* (self-represented) litigants who have access to the internet use the Manual that is available on the Court's website, because the electronic version:

- is organized to help you find what is important to your case at each stage in the litigation;
- is searchable by text or words;
- contains links to the Court's official forms, which can be filled out electronically and then printed for filing;
- is environmentally responsible and cost-efficient, so we can use our limited resources to improve our other services to the public.

If you are not able to use the online version of the Manual, and if you have been granted *in forma pauperis* (IFP) status, you may request *one* free copy of it.[1] If you do not have IFP status, or if you have already received a copy, you must pay $15.00. To request a free copy, you must return this document.

Campbell Anthony #16A4150
Name (Last, First, MI)

Bare Hill C.F. Caller Box 20, Malone, N.Y. 12953
Address City State Zip Code

n/A
Telephone Number

n/A
e-mail address

12·03·2016
Date

[signature] Campbell
Signature

[1] Litigants who are bringing *habeas corpus* petitions or social security cases, or whose cases have been dismissed or transferred, are not entitled to a free Manual.

500 PEARL STREET | NEW YORK, NY 10007
300 QUARROPAS STREET | WHITE PLAINS, NY 10601

PRO SE INTAKE UNIT: 212-805-0175

Rev. 3/17/15

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(Attachment #1)

Presented in front of A.J.S.C. Judge Mr. Seth Marrin of The Supreme Court Of The State of New York, County of The Bronx, Criminal Term Part T-27 on 1·22·2014. I WAS Represented by Richard Joselson Of The Legal Aid Society in the matter of Dismissing The Sex Offender Risk level Assessment (SORA) Proceedings. A Judgment Was Ruled in my favor and The SORA Proceeding was Dismissed. On June 10, 2016 I recieved A copy of my Finger Print Responce Summery (RAP Sheet) And I am still listed As A "Tier I Registered Sex Offender (Inactive).

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SUPREME COURT OF THE STATE OF NEW YORK
BRONX COUNTY: CRIMINAL TERM: PART T-27

---------------------------------------X SCID #99043/13

THE PEOPLE OF THE STATE OF NEW YORK, :

-against- :

ANTHONY CAMPBELL, :

Defendant. :

---------------------------------------X

NOTICE OF MOTION TO DISMISS SORA PROCEEDING

PLEASE TAKE NOTICE, that upon the annexed affirmation of Richard Joselson, who is associated with Steven Banks, the Attorney-in-Chief of The Legal Aid Society, the accompanying exhibits and memorandum of law, and all prior proceedings, the undersigned will move the Supreme Court of the State of New York, Bronx County, Criminal Term, Part T-27, on January 22, 2014, at 9:30 a.m., or as soon thereafter as counsel may be heard, for an order:

1. Dismissing the Sex Offender Risk Level Assessment proceeding currently pending before the Court because the 2003 Virginia misdemeanor sexual battery offense of which Mr. Campbell was convicted (Va. Code §18.2-67.4) is not equivalent to any New York State offense for which SORA registration is required. *See* C.L. §168-a (2)(d)(i).

2. Granting such additional relief as the Court deems just and proper. No previous application for the relief sought herein has been made to any court.

Dated: New York, New York
December 17, 2013

Respectfully submitted,

STEVEN BANKS
The Legal Aid Society
Criminal Appeals Bureau
199 Water Street -- 5th Floor
New York, New York 10038

RICHARD JOSELSON
Of Counsel
(212) 577-3451

TO: CLERK OF THE COURT
Bronx County Supreme Court
265 East 161st Street
Bronx, New York 10451

HON ROBERT T. JOHNSON
District Attorney
Bronx County
198 East 161st Street
Bronx, New York 10451

SUPREME COURT OF THE STATE OF NEW YORK
BRONX COUNTY: CRIMINAL TERM: PART T-27

---------------------------------------X SCID #99043/13

THE PEOPLE OF THE STATE OF NEW YORK, :

-against- :

ANTHONY CAMPBELL, : AFFIRMATION

Defendant. :

---------------------------------------X

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

RICHARD JOSELSON an attorney admitted to practice in the courts of this State, hereby affirms under the penalties of perjury, that the following statements are true, except those made on information and belief, which he believes are true:

1. I am associated with Steven Banks, Attorney-in-Chief of The Legal Aid Society, which was assigned by the Court to represent Mr. Campbell in connection with this Sex Offender Registration Act (SORA) proceeding. I have examined the materials provided to the Court by the Board of Examiners of Sex Offenders (the Board) and am fully familiar with those materials.
2. On August 22, 2013, the Board prepared a Risk Assessment Instrument (RAI) and Case Summary, asserting that Mr. Campbell is obliged to register as a sex offender in New York State

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based upon his 2003 misdemeanor conviction in Virginia for Sexual Battery. Va. Code §18.2-67.4. According to the Board, Mr. Campbell received a 12 month sentence on that case, but the sentencing judge suspended all 12 months of the term. The Board assessed 55 points against Mr. Campbell on the RAI. It recommends that the Court adjudicate him a level one offender.

3. I offer this affirmation in support of defendant's motion, brought pursuant to C.L. §168-a (2)(d)(i), to dismiss the pending SORA proceeding. This Court has the authority to determine this motion. *See People v. Liden*, 19 N.Y.3d 271 (2012) (overruling prior line of cases requiring Article 78 challenge to registration obligation and assigning to risk level assessment court the responsibility for determining whether an out-of-jurisdiction offender must register under SORA in New York).

4. In a nutshell, the defense argument is as follows: Under SORA, an individual convicted of an offense in another jurisdiction must register in New York if one of two conditions are met. First, registration is required if the out-of-state crime "includes all the essential elements" of a New York registerable offense. §168-a (2)(d)(i). Second, an offender must register in New York if the conviction in the other-jurisdiction was for a felony for which registration is required. §168-a (2)(d)(ii). Here, the Board appears to

locate Mr. Campbell's obligation to register in the latter provision, as it contends in the Case Summary that Mr. Campbell is obliged to register in Virginia. Nonetheless, as the Case Summary acknowledges, Mr. Campbell's Virginia conviction was for a misdemeanor. Therefore, New York registration is not required under subdivision ii of C.L. §168-a (2)(d). Thus, although the Board does not say so, its position that Mr. Campbell must register in New York must necessarily be predicated on subdivision i – that Mr. Campbell's Virginia offense shares all the essential elements of a New York crime for which registration is required. Significantly, the Board does not identify which New York SORA offense it considers comparable to the Virginia crime. Because, for the reasons outlined below and in the accompanying memorandum of law, the Virginia misdemeanor of sexual battery, as defined in Va. Code §18.2-67.4 is broader than any New York SORA offense, Mr. Campbell should not be required to register here and the Court should dismiss this SORA proceeding.

5. On July 17, 2003, Mr. Campbell was convicted of misdemeanor sexual battery in Virginia. He received a 12 month jail sentence, all of which was suspended by the sentencing court. Under Virginia law, a person commits misdemeanor sexual battery when he "sexually abuses" another person by, *inter*

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alia, means of a "ruse." Va. Code §18.2-67.4. No New York SORA offense criminalizes conduct accomplished through the use of a ruse. In addition, under Virginia law, "sexual abuse" occurs not only when an offender acts with an intent to gratify the sexual desires of either party, but also when other intents are present. Va. Code §18.2-67.10 (6). In New York, "sexual contact," the corresponding term, occurs only when the contact at issue is for the purpose of "gratifying the sexual desire of either party." P.L. 130.00(3).

6. The Board has not provided the Court with the minutes of Mr. Campbell's guilty plea or sentence. Nor has it provided any court papers or sworn witness statements detailing the nature of the acts alleged.

7. The sole description of the offense that the Board has provided is contained in a Supplemental Report prepared by an officer with the Chesapeake, Virginia Police Department, containing unsworn hearsay statements attributed to the complainant. (The relevant police report is attached hereto as Exhibit A). According to the report, the offense occurred when Mr. Campbell was 27 and the complaining witness was 17. The two were acquaintances at the time of the incident. The police became involved when the complainant's father contacted the authorities. As to the relationship between the complainant and her parents, the reporting officer opined, "I

got the impression that they do not let her do much of anything." When the officer subsequently suggested to the complainant that she did not appear as "sheltered" as her parents believed, the complainant acknowledged that this was true.

8. According to the police report, the charged incident had its genesis in a ruse or deception by Mr. Campbell. Specifically, he first told the complaining witness that he was "interested" in one of her friends and she invited him over to her home after her parents had left. Mr. Campbell accepted the invitation.

9. When Mr. Campbell arrived at the complainant's home, he took a different tack, claiming now that he was actually "interested" in the complainant herself and not her friend. She replied (falsely, she later claimed) that she already had a boyfriend. He began kissing her, giving her hickeys, and she asked that he stop. He apparently did stop kissing her, but then leaned over and rolled on top of her, grabbing her "breasts, butt and vagina through her clothes." She later told police that this was unwanted and that his size overpowered her, but it is not clear from the police report whether she again asked Mr. Campbell to stop. In any event, he did stop, and he began conversing with her further. The complainant told him that she was not interested in sex before marriage. Mr. Campbell

asked her (apparently facetiously) to marry him. When she demurred, he simply left without incident.

10. The police subsequently arrested him in response to the father's complaint.

11. Although Mr. Campbell pleaded guilty to the misdemeanor, thereby accepting responsibility for his conduct under the statute, none of the materials provided by the Board indicate that Mr. Campbell acknowledged committing the offense in any particular way.

12. For the reasons more fully advanced in the accompanying memorandum of law, because the Virginia offense to which Mr. Campbell pleaded guilty is broader than any New York crime for which registration is required, he should not be obliged to register in New York and this SORA proceeding should be dismissed.

Dated: New York, New York
December 17, 2013

RICHARD JOSELSON

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SUPREME COURT OF THE STATE OF NEW YORK
BRONX COUNTY: CRIMINAL TERM: PART T-27

SCID #99043/13

THE PEOPLE OF THE STATE OF NEW YORK,

-against-

ANTHONY CAMPBELL,

Defendant.

MEMORANDUM OF LAW

QUESTION PRESENTED

Whether the court must dismiss this SORA proceeding because misdemeanor sexual battery in Virginia has no New York SORA equivalent.

VIRGINIA STATUTES INVOLVED

Va. Code §18.2-67.4 provides, in relevant part:

> An accused shall be guilty of sexual battery if he or she sexually abuses, as defined in §18.2-6710, (i) the complaining witness against the will of the complaining witness, by force, threat, intimidation, ruse, or through the use of the complaining witness' mental incapacity or physical helplessness.

Va. Code §18.2-67.10 provides, in relevant part,:

> As used in this article:
>
> 6. "Sexual abuse" means an act committed with the intent to sexually molest, arouse or gratify any person, where: a. the accused intentionally touches the complaining witness' intimate parts or material directly covering such intimate parts

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STATEMENT OF FACTS

The allegations contained in the accompanying affirmation of Richard Joselson as well as those contained in the accompanying exhibits are incorporated herein by reference.

ARGUMENT

THE COURT MUST DISMISS THIS SORA PROCEEDING BECAUSE MISDEMEANOR SEXUAL BATTERY IN VIRGINIA HAS NO NEW YORK SORA EQUIVALENT. C.L. §168-a (2)(d)(i).

Mr. Campbell stands before the court with a 2003 Virginia conviction of misdemeanor sexual battery under Va. Code §18.2-67.4. He was 27 years old at the time. He had never before been charged with a sexual offense and has not been accused of one since. As a sanction, the Virginia judge imposed a 12-month jail term, but then suspended all of it. In determining whether Mr. Campbell must now register as a New York sex offender for at least the next 20 years, the court must decide whether the Virginia crime shares "all the essential elements" of a New York SORA crime. C.L. §168-a (2)(d)(i). It does not for two reasons. First, the Virginia offense criminalizes conduct accomplished by means of a "ruse." Va. Code §18.2-67.4. No New York SORA offense contains a comparable requirement. Second, under Virginia law, an offender committing misdemeanor battery may be motivated by an intent other than the sexual

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gratification of either party. Va. Code §18.2-67.10(6). "Sexual contact," the equivalent term under New York law, occurs only when the offender is motivated by an intent to gratify the sexual desires of either party. P.L. §130.00(3).

Federal and state case law uniformly recognizes that Sex Offender Registration Act determinations are subject to due process strictures. Indeed, the Court of Appeals has held that a "[d]efendant's private interest, his liberty interest, in not being stigmatized" as a sex offender is "substantial." People v. David W., 95 N.Y.2d 130, 137 (2000), citing E.B. v. Verniero, 119 F.3d 1077, 1107 (3d Cir. 1997); Doe v. Pataki, 3 F.Supp. 456, 469 (E.D.N.Y. 1998). As the Third Circuit has noted, "[n]otification puts the registrant's livelihood, domestic tranquility and personal relationships with all around him in grave jeopardy," so "an overestimation will lead to immediate and irreparable harm." E.B., 119 F.3d at 1107, 1110. While E.B. involved the adjudication of an offender's risk level, the due process concerns apply with at least equal force where, as here, the question is whether an individual is obliged to register at all. Accordingly, in determining whether an individual with a conviction from another jurisdiction must register as a sex offender in New York, the Board, in the first instance, and the People, at a hearing, bear the burden of proving that registration is required by clear and convincing evidence. *See* C.L. §168-n(3); *People v. Johnson*, 11 N.Y.3d 416, 421 (2008).

In *North v. Board of Examiners of Sex Offenders*, 8 N.Y.3d 745 (2007), the Court of Appeals interpreted C.L. §168-a(2)(d)(i)'s requirements for determining whether an out-of-state offender must register under SORA in New York. In that case, the petitioner urged that, in conducting this "essential-elements" analysis, the Court should employ a "strict equivalency standard," the same approach used to determine whether an out-of-state conviction can serve as a predicate offense in New York for enhanced sentencing purposes. *Id.* at 750-51. This approach "examines the elements of the foreign conviction to determine whether the crime corresponds to a New York felony, usually without reference to the facts giving rise to that conviction." *Id.* Under it, the Court noted, "technical distinctions between the New York and foreign penal statutes can preclude use of a prior felony as a predicate for enhanced sentencing purposes even though the actual criminal conduct leading to the foreign conviction would have fallen within the ambit of the New York offense." *Id.* (citations omitted).

Citing SORA's remedial purposes, the Court rejected the strict equivalency standard for determining whether an out-of-state conviction will give rise to registration obligations in New York. *Id.* at 752. Nonetheless, the Court recognized that the first step of an appropriate analysis requires "compar[ison] of the elements of the foreign offense with the analogous New York offense to identify points of overlap." *Id.* at 753. The Court concluded:

> In circumstances where the offenses overlap but the foreign offense also criminalizes conduct not covered under the New York offense, the Board must review the conduct underlying the foreign conviction to determine if that conduct is, in fact, within the scope of the New York offense. If it is, the foreign conviction is a registerable offense under SORA's essential elements test.

Id.

Applying this test in *North* itself, the Court held that the petitioner was required to register. North had been convicted in federal court of possessing child pornography. The federal statute under which he was convicted criminalized the possession of images of children under the age of eighteen. *Id.* at 750. It overlapped, in many respects, with the New York SORA offense of possessing a sexual performance by a child. The New York offense, however, applied only to images of children under the age of sixteen. *Id.* Recognizing that the federal offense covered some activity not covered by the New York crime – possession of pornography involving children age sixteen or seventeen – the Court ruled that "review of the conduct underlying petitioner's conviction is necessary." Because North had confessed to possessing images of children as young as seven and because that issue was "undisputed" in the litigation, the Court concluded that registration was required. *Id.*

A different result ensues when *North*'s analysis is applied here and neither the Board nor the People have provided the clear and convincing evidence necessary to support a determination that registration is required. First, the misdemeanor sexual battery in Virginia clearly encompasses conduct that is broader than any New York SORA offense. Prior to 1997, the Virginia offense, in relevant part, was defined as follows:

> An accused shall be guilty of sexual battery if he or she sexually abuses, as defined in §18.2-6710, (i) the complaining witness against the will of the complaining witness, by force, threat, intimidation, or through the use of the complaining witness' mental incapacity or physical helplessness.

Va. Code §18.2-67.4. Under this version of the statute, "some force other than merely the force required to accomplish the unlawful touching" was required. *Johnson v. Commonwealth*, 365 S.E.2d 237, 240 (Va. App. 1988). This, however, is not the statute under which Mr. Campbell was convicted.

In 1997, the Virginia General Assembly significantly broadened the offender's liability by amending the misdemeanor sexual battery statute. Initially, the amendment proposed to criminalize sexual abuse accomplished by a means of a "ruse" *and* "contrary to the intent" of the complaining witness. *See* Virginia General Assembly, Legislative Draft, 97-1544635, attached as Exhibit B. This alteration alone would have extended liability. In the end, however, the General Assembly went farther yet. As enacted, the amendment dropped any requirement that the resulting sexual contact be "contrary to the intent" of the complainant, criminalizing instead, all conduct effectuated as the result of a "ruse." *See Woodard v. Commonwealth*, 499 S.E.2d 557, 559 n. 1 (Va. App. 1998). Hence, even if the complainant intends the resulting sexual contact, offenders are still liable for misdemeanor sexual battery in Virginia if they accomplish their ends by means of a "ruse." While the statute itself does not define "ruse," the term is generally understood to encompass "a trick or act used to fool someone" or "a wily subterfuge." *See* Free Merriam-Webster Dictionary at www.merriam-webster.com/dictionary/ruse (visited December 17, 2013).

No New York SORA offense sweeps so broadly. Thus, it is hardly surprising that the Board, despite its burden of proof on the issue, fails even to suggest one, fixing instead on Mr. Campbell's alleged requirement to register in Virginia, a factor that has no relevance because the conviction at issue is for a misdemeanor. The Board's silence is telling. No comparable New York SORA crime exists.

Sexual abuse in the first degree in New York requires either forcible compulsion, physical helplessness or age limitations not applicable here. P.L. §130.65. Forcible touching, as defined in P.L. §130.52, similarly requires the use of force. Even sexual abuse in the third degree mandates sexual contact without the victim's "consent," P.L. §130.55, a requirement that the Virginia General Assembly apparently jettisoned when it declined to add a provision that the touching be "contrary to the intent" of the complainant at the same time that it added touching accomplished by means of a "ruse" to the misdemeanor sexual battery statute. Thus, under Virginia law, unlike under any New York SORA crime, even when the complainant consents to, or acquiesces in, the sexual contact, an offender is still guilty of Virginia sexual battery if that consent or acquiescence was obtained by means of a ruse. On this basis alone, the offense of which Mr. Campbell was convicted is broader than any New York SORA crime.

Misdemeanor sexual battery is broader than the New York SORA offenses in one other respect as well. In New York, "sexual contact" requires touching "for the purpose of gratifying the sexual desires of either party." P.L. §130.00(3). "Sexual abuse," the comparable term in Virginia, includes this intent, but also includes the intent to "sexually molest." That term, as defined in Virginia case law, means "to meddle or interfere with unjustifiably, often as a result of abnormal sexual motivation." *Pulliam v. Commonwealth*, 688 S.E.2d 910, 913 n. 2 (Va. App. 2010) (dictionary citation omitted); *Berton v. Commonwealth*, __ S.E.2d __, 2013 WL 6230647 (Va. App. 2013) at n. 10(same). Whatever the precise contours of this definition, they are plainly broader in scope than the "gratification" that has to be intended for there to be "sexual contact" in New York. For this reason, too, misdemeanor sexual battery in Virginia extends beyond any New York SORA crime.

Further, unlike in *North*, the limited information available about the offense contained in a Chesapeake Police Department supplemental report fails to provide the requisite assurance that the actual conduct underlying Mr. Campbell's conviction would have been equivalent to any New York SORA crime. *North* was a simple case in this respect because the record irrefutably established the ages of the children portrayed in the images and the petitioner conceded that his actual conduct fell within the ambit of the New York SORA crime. Because the pornographic images that North possessed were indisputably of very young children, the differences between the New York and federal crimes - New York statutes, unlike their federal counterparts, did not criminalize possession of images of 16 and 17 year olds

– were not remotely relevant and, hence, North was obliged to register.

Here, in sharp contrast to *North*, the record contains no such clarity and the defense makes no concession that Mr. Campbell's conduct, though covered by the Virginia statute, equates to a New York SORA offense. In support of the adjudication, the Board has provided no minutes of any Virginia court proceedings, no relevant court documents and no sworn statements of any variety. Rather, the Board has provided only a police report labeled "Confidential Supplement," containing an investigating officer's recitation of the complaining witness's unsworn hearsay allegations regarding the incident. In a case such as this, where the out-of-jurisdiction statute at issue sweeps more broadly than any New York SORA crime, evidence of this nature – a far cry from the incontrovertible and uncontested proof offered in *North* – simply cannot provide the clear and convincing evidence necessary to mandate long-term registration as a sex offender with all of its attendant consequences.

In any event, even if the hearsay contained in the police report is considered, there is still no clear and convincing evidence establishing that the acts underlying the conviction equated to a New York SORA offense. According to the report, Mr. Campbell, who was 27, and the seventeen-year-old complainant were known to one another. She indisputably invited him to her home at a time when she knew that her parents would be away and, indeed, directed him to arrive only after they were gone. The investigating officer opined, *in writing*, that the complainant's parents acted aggressively to curtail her social activities. The officer further opined that the complainant was not nearly as "sheltered" as her parents believed. The complainant agreed with that assessment. Significantly, the initial complaint to police in this case was made not by the complainant herself, but by her father.

To the extent that it suggests anything, the supplemental police report suggests that a "ruse" played a role in the offense, making this a possible statutory basis for the conviction. Specifically, according to the investigating officer, Mr. Campbell gained access to the complainant and her apartment by means of trickery and deception, first telling her that he was interested only in her friend and then, after he was inside, stating that he was interested in her. No other theory of culpability emerges clearly from the police report. Although the complainant asked Mr. Campbell to stop when his kissing her cause her to develop hickeys, he apparently stopped kissing her, instead leaning over to touch or grab her breasts, butt and vagina through her clothes. Although, in her subsequent statement to police, the complainant labeled the conduct as "unwanted" and averred that she was overpowered by Mr. Campbell's weight on top of her, it is by no means clear that the complainant repeated the initial request to stop or otherwise conveyed her discomfort to Mr. Campbell. In any event, Mr. Campbell did stop, seemingly almost immediately. Thereafter, when he asked to "make love" to her and she said that she did not wish to have sex before marrying, he jokingly proposed, they talked awhile longer and then he simply left.

On this record, it cannot be said with any confidence that Mr. Campbell's plea was predicated on a force, threat or intimidation theory as opposed to a "ruse" theory. There is certainly no clear and convincing evidence to support this conclusion. Nor cannot it be said that Mr. Campbell's intent, which must necessarily be inferred from conduct, fell under the narrower New York definition, rather than the more expansive definition under which he pleaded guilty.

For all of these reasons, his conduct and the resulting conviction has no New York SORA equivalent. Accordingly, this Court should grant the defense motion to dismiss.

CONCLUSION

FOR THE REASONS ADVANCED HEREIN, THE DEFENSE MOTION TO DISMISS SHOULD BE GRANTED.

Respectfully submitted,

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RICHARD JOSELSON
Of Counsel
December 2013

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX : **PART T-27**

---X

THE PEOPLE OF THE STATE OF NEW YORK

AFFIRMATION IN OPPOSITION

-against-

SCID NO.
99043/13

ANTHONY CAMPBELL,

Defendant.

---X

STATE OF NEW YORK)
) **ss:**
COUNTY OF BRONX)

I, **JENNIFER M. BECKER**, under penalty of perjury and pursuant to Rule 2106 of the C.P.L.R., hereby affirm and state:

That I am an Assistant District Attorney, duly admitted, in the Office of ROBERT T. JOHNSON, District Attorney of Bronx County and am presently assigned to the Criminal Court Bureau.

That I submit this affirmation in response to defense counsel's Motion to Dismiss SORA Proceeding.

I base this affirmation on information and belief, based upon the records maintained by the District Attorney which I believe to be true and accurate.

THE PEOPLE OPPOSE DEFENDANT'S MOTION TO DISMISS SORA PROCEEDING

Statement of Facts

Defendant was convicted upon his plea of guilty to the Virginia misdemeanor offense of Sexual Battery (Va. Code §18.2-67.4) on July 17, 2003. The offense for which defendant was convicted requires registration as a Sex Offender in Virginia. Defendant now resides in New York State, Bronx County.

Va. Code §18.2-67.4 provides, in relevant part, "an accused is guilty of sexual battery if he sexually abuses [as defined in §18.2-67.10] (i) the complaining witness against the will of the complaining witness, by force, threat, intimidation, or ruse". Va. Code §18.2-67.10(6) defines "sexual abuse" as "an act committed with the intent to sexually molest, arouse, or gratify any person, where (a) the accused intentionally touches the complaining witness's intimate parts or material directly covering such intimate parts".

Argument

Defendant now moves this Court to dismiss the SORA proceeding requiring him to register as a Sex Offender in New York State as a result of the aforementioned Virginia conviction on the ground that the offense for which he was convicted has no New York State equivalent requiring Sex Offender registration. The People disagree.

Defendant's Virginia conviction is equivalent to New York State Penal Law §130.60(1), Sexual Abuse in the Second Degree, a class A misdemeanor for which registration as a Sex Offender is required. P.L. §130.60(1) reads "[a] person is guilty of sexual abuse in the second degree when he or she subjects another person to sexual contact and when such other person is: [1] incapable of consent by reason of some factor other than being less than seventeen years old". Penal Law §130.00(3) defines "sexual contact" as "any touching of the sexual or other intimate parts of a person for the purpose of gratifying sexual desire of either party. It includes the touching of the actor by the victim, as well as the touching of the victim by the actor, whether directly or through clothing, as well as the emission of ejaculate by the actor upon any part of the victim, clothed or unclothed." Whether specifically stated or not, every sexual offense in the New York State Penal Law requires proof that the sexual act was committed without the consent of the victim. Penal Law § 130.05(2) defines the manners in which lack of consent results, in pertinent part, as: (a) forcible compulsion; or (2) incapacity to consent; or (c) where the offense charged is sexual abuse or forcible touching, any circumstances, in addition to forcible compulsion or incapacity to consent, in which the victim does not expressly or impliedly acquiesce in the actor's conduct".

Correction Law § 168-a(2)(d)(i) provides that a person must register as a Sex Offender in New York State when s/he has a conviction of "an offense in any other jurisdiction which includes all of the essential elements" of any New York State Penal Law offense which requires Sex Offender registration. Defendant argues that New York has no comparable offense requiring Sex Offender registration which includes all the essential elements of Va. Code § Va. Code §18.2-67.4, the offense for which defendant has been convicted, and therefore he should not be subjected to the registration requirement of SORA in New York.

The Court of Appeals first had occasion to address this very issue in Matter of Todd North v. Board of Examiners of Sex Offenders of State of New York. 8 N.Y.3d 745 (2007). As defendant points out, the petitioner in Matter of Todd North urged the Court to use the strict equivalency standard which courts use to determine whether a previous offense committed in a foreign jurisdiction is a predicate for the purposes of enhanced sentencing. The Court rejected petitioner's argument, refusing to apply such a strict standard to the "essential elements" requirement necessary for Sex Offender registration based on a foreign jurisdiction conviction. Id. at 751. Rather, the Court held that the "essential elements" provision of SORA requires the comparison of "the elements of the foreign offense with the analogous New York offense to identify points of overlap." When it is determined that the two offenses cover the same conduct, no further analysis is required for it to be evidence that registration in New York is required. Id. at 753. The Court further held that "in circumstances where the offenses overlap but the foreign offense also criminalizes conduct not covered under the New York offense" the conduct underlying the foreign conviction must then be reviewed to determine, "if that conduct is, in fact, within the scope of the New York offense. If it is, the foreign conviction is registrable offense under SORA's essential elements test." Id. at 753 (specifically holding that a federal statute criminalizing specified conduct with persons under eighteen years old required Sex Offender registration in New York despite New York's analogous statute criminalizing the same conduct with persons under sixteen).

The People oppose defendant's assertion that the Virginia code for which he stands convicted is overly broad as compared to New York's analogous statute. New York Penal Law §130.60(1) contains all of the essential elements of Virginia code §18.2-67.4. Both statutes criminalize the act of sexual abuse committed without the complainant's consent. Both Virginia and New York essentially define sexual abuse as a touching of intimate parts, whether it be directly or through clothing, with the intent for sexual gratification. Both state's statutes require the sexual abuse to be without the consent of the complaining witness and enumerate the manners in which there is no consent. Virginia enumerates lack of consent by force, threat, intimidation, or ruse. Va. Code §18.2-67.4(i). New York enumerates lack of consent by forcible compulsion, incapacity to consent (further defined in P.L. §130.05[3]); or where the offense charged is sexual abuse or forcible touching, **any circumstances**, in addition to forcible compulsion or incapacity to consent, **in which the victim does not expressly or impliedly acquiesce in the actor's conduct**. P.L. §130.05(2) (emphasis added).

Virginia Code §18.2-67.4 and New York Penal Law §130.60(1) contain all of the essential elements of one another and therefore defendant is required to register as a Sex Offender in New York. However, if this Court agrees with defendant that Virginia Code §18.2-67.4 is more broad as compared to New York Penal Law §130.60(1) then the People urge this Court to follow Matter of Todd North and turn to the underlying conduct to determine if the conduct in itself is within the scope of a New York offense requiring registration.

Defendant's conduct leading to his conviction is as follows: Defendant, aged 27, had an interaction with the complaining witness, aged 17, during which defendant began to kiss the complainant. The complainant told defendant to stop. Defendant placed his body on top of the complainant in a manner she described overpowered her and prevented her from moving. Defendant then touched her breasts, buttocks and vagina through her clothing. See Board of Examiners Case Summary and Chesapeake Virginia Police Department Confidential Supplement.

The underlying conduct, had it been committed in New York, would clearly have established the elements of Penal Law §130.60(1). Therefore, even if this Court believes the language of Virginia Code §18.2-67.4 is more broad then New York Penal Law §130.60(1), turning to the underlying conduct requires defendant to register in New York.

Defendant also argues that this Court should not rely on the Chesapeake, Virginia Police Department reports attached to the Board of Examiners assessment as said police reports are unreliable hearsay. The document entitled "Confidential Supplement, Chesapeake Police Department" clearly states on page 2 that the information contained in the report is being documented by a police officer based on information relayed to her by the complaining witness (her name appears blacked out). The Court of Appeals in People v. Mingo, 12 N.Y.3d 563

(2009) held that in a SORA proceeding hearsay is reliable, and therefore appropriately relied upon, when, "if, based upon the circumstances surrounding the development of the proof, a reasonable person would deem it trustworthy". At 574. The Mingo Court stated that SORA courts, such as this Court, must have the flexibility to make reliability determinations on a case-by-case basis. Id. at 574. Factors the Court found should be considered in evaluating the reliability of the hearsay were "age of the conviction, efforts made to locate relevant documents, whether the proof is corroborated either by the nature of the conviction or other evidence in the record; whether declarant was under oath or acting under a duty to accurately report, record or convey information, and whether the circumstances surrounding the making of the statement otherwise bear indicia of reliability." Id. at 574.

Certainly, the police officer who completed the Confidential Supplement was acting under a duty to do so accurately. The document itself indicates the information was relayed directly from the complainant to the officer who created the report. And finally, the information contained in the report is corroborated by defendant's admission of the conduct, his plea of guilty. As such, the Chesapeake, Virginia police reports accompanying the Board of Examiner's assessment should be considered reliable hearsay and its content utilized in determining that defendant's conduct requires registration in New York as a Sex Offender.

WHEREFORE, based upon the foregoing the People respectfully request this Court deny defendant's motion.

DATED: BRONX, NEW YORK
January 8, 2014

Respectfully submitted,

JENNIFER M. BECKER
Assistant District Attorney
Sex Crimes/Child Abuse Bureau
Bronx County District Attorney's Office
(718) 838-6552

To: CLERK
Supreme Court, Bronx County
Part T-27

Richard Joselson, Esq.
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SUPREME COURT OF THE STATE OF NEW YORK
BRONX COUNTY: CRIMINAL TERM: PART T-27

SCID #99043/13

THE PEOPLE OF THE STATE OF NEW YORK,

-against-

ANTHONY CAMPBELL,

Defendant.

REPLY AFFIRMATION

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

RICHARD JOSELSON an attorney admitted to practice in the courts of this State, hereby affirms under the penalties of perjury, that the following statements are true, except those made on information and belief, which he believes are true:

1. I am associated with Steven Banks, Attorney-in-Chief of The Legal Aid Society, which was assigned by the Court to represent Mr. Campbell in connection with this Sex Offender Registration Act (SORA) proceeding.
2. I offer this affirmation and the accompanying Reply Memorandum of law in response to the People's Affirmation in Opposition, which is dated January 8, 2014.
3. In their affirmation, the People contend that Mr. Campbell must register in New York because the Virginia offense of misdemeanor sexual battery of which he was convicted, Va. Code

18.2-67.4, contains all the essential elements of the New York crime of sexual abuse in the second degree, P.L. 130.60(1), an offense for which registration is required. Alternatively, the People assert that, even if the Virginia crime, as defined, is broader than second-degree sexual abuse, the information contained in the Supplemental Report prepared by the Chesapeake, Virginia Police Department establishes, by clear and convincing evidence, that Mr. Campbell's conduct amounted to second-degree sexual abuse.

4. For the reasons advanced in the accompanying memorandum of law, the People are mistaken on both counts, and, accordingly, this SORA proceeding should be dismissed.

Dated: New York, New York
January 28, 2014

RICHARD JOSELSON

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SUPREME COURT OF THE STATE OF NEW YORK
BRONX COUNTY: CRIMINAL TERM: PART T-27

SCID #99043/13

THE PEOPLE OF THE STATE OF NEW YORK,

-against-

ANTHONY CAMPBELL,

Defendant.

REPLY MEMORANDUM OF LAW

STATEMENT OF FACTS

The allegations contained in the reply affirmation of Richard Joselson as well as those contained in the affirmation and exhibits accompanying the initial motion to dismiss this SORA proceeding are incorporated herein by reference.

ARGUMENT

CONTRARY TO THE PEOPLE'S CLAIMS, NEITHER THE VIRGINIA CRIME OF MISDEMEANOR SEXUAL BATTERY NOR MR. CAMPBELL'S UNDERLYING CONDUCT AS ALLEGED IN THE CHESAPEAKE, VIRGINIA POLICE REPORT, AMOUNTS TO SECOND-DEGREE SEXUAL ABUSE, A REGISTERABLE OFFENSE IN NEW YORK.

The People's response to Mr. Campbell's motion to dismiss narrows the issues before this Court. In it, they acknowledge that misdemeanor sexual battery in Virginia, as defined in Va. Code §18.2-67.4, may be committed by means of a "ruse." They cite no New York SORA offense that may be accomplished by a ruse, but contend, nonetheless, that Virginia sexual battery is equivalent, on the elements, to second-degree sexual abuse as

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defined P.L. §130.60(1). In this respect, they are mistaken. Alternatively, they argue that, elements aside, there remains clear and convincing evidence in the Chesapeake police report establishing that Mr. Campbell's actions rose to the level of second-degree sexual abuse. As to this contention, they are mistaken as well.

Second-degree sexual abuse, which is a registerable offense in New York, is defined as follows:

> A person is guilty of sexual abuse in the second degree when he or she subjects another person to sexual contact and when such other person is:
>
> (1) Incapable of consent by reason of some factor other than being less than seventeen years old.

P.L. §130.60(1). Incapacity to consent, in turn, is defined in P.L. §130.05(3). In addition to being less than seventeen (P.L. §130.05 (3)(a), that provision deems a person incapable of consent when he or she is mentally disabled, P.L. §130.05(3)(b),[1] mentally incapacitated, P.L. §130.05(3)(c),[2] physically helpless,

---

[1] A person is mentally disabled when the person "suffers from a mental disease or defect which renders him or her incapable of appraising the nature of his or her conduct." P.L. §130.00(5).

[2] A person is "mentally incapacitated" when the person "is rendered temporarily incapable of appraising or controlling his [or her] conduct owing to the influence of a narcotic or intoxicating substance administered to him [or her] without his [or her] consent, or to any other act committed . . . without . . . consent."

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P.L. §130.05(3)(d),[3] in the custody of DOCCS, a local correctional facility, or the office of children and family services (if the actor is an employee of those agencies), P.L. §130.05(3)(e)-(g), or a patient or client of a health care facility (when the actor is a health care or mental health care provider). P.L. §130.05(3)(h).

Contrary to the People's contention, misdemeanor sexual battery in Virginia sweeps far more broadly than second-degree sexual abuse. To be sure, under Va. Code §18.2-67.4, an offender can commit sexual battery against a mentally incapacitated or physically helpless victim, but neither those features nor any other incapacity to consent are required under the Virginia statute. Rather, an offender in Virginia can commit sexual battery against a complainant who is fully capable of consenting so long as the offender employs a "ruse." Since such acts would plainly not constitute second-degree sexual abuse in New York, the Virginia statute encompasses conduct well beyond that covered by the New York offense and the People are mistaken when they contend otherwise. Hence, on the elements, misdemeanor sexual battery in Virginia is not the equivalent of the New York SORA crime of second-degree sexual abuse.

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[3] Physically helpless, in turn, means "unconscious or for any other reason . . . physically unable to communicate unwillingness to an act." P.L. 130.00(7).

Nor, under *North v. Board of Examiners of Sex Offenders*, 8 N.Y.3d 745 (2007), does Mr. Campbell's conduct equate to second-degree sexual abuse. Simply put, even considering the Chesapeake police report at face value, there is no basis to conclude that the complaining witness was incapable of consent on any of the grounds defined in P.L. §130.05(3)(b)- (h). Plainly, the People cannot make this showing by clear and convincing evidence. For this reason as well, Mr. Campbell's Virginia offense is not equivalent to second-degree sexual abuse.

Finally, the People's citation to the definition of "lack of consent" contained in P.L. §130.05(2)(c), does not alter the fact that second-degree sexual abuse under P.L. §130.60(1) requires not only a lack of consent, but an *incapacity* to consent. The People's conflation of the two analytically distinct concepts notwithstanding, their argument fails because (1) second-degree sexual abuse requires proof of incapacity whereas Virginia sexual battery does not and (2) the "facts" of the incident as described in the Chesapeake police report do not establish the complainant's incapacity to consent. On this basis alone, the People's argument fails and this SORA proceeding must be dismissed.

In any event, sexual battery in Virginia does not, contrary to the People's argument, require a lack of consent as that term is defined in P.L. §130.05(2)(c). Indeed, as we argued in our initial submission, in 1997, the Virginia General Assembly amended the misdemeanor sexual battery statute to expand liability by criminalizing sexual abuse accomplished by means of a "ruse." At the same time, the Legislature declined to add to the statute a provision requiring that the resulting sexual activity be "contrary to the intent" of the complaining witness. *See* Main Memorandum of Law at pp. 6-7. Thus, under the Virginia statute, even if the complaining witness intends the resulting sexual conduct, the actor will still be liable for sexual battery if he accomplishes his ends by means of a "ruse." Neither second-degree sexual abuse nor any other New York SORA offense goes this far. For this reason, too, Mr. Campbell is not obliged to register in New York and this Court should dismiss these SORA proceedings.

CONCLUSION

FOR THE REASONS ADVANCED HEREIN, AS WELL AS THOSE ADVANCED IN THE ORIGINIAL MEMORANDUM OF LAW, THIS COURT SHOULD DISMISS THE SORA PROCEEDINGS.

Respectfully submitted,

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RICHARD JOSELSON
Of Counsel
January 2014

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, CRIMINAL TERM: PART T27
-- X
PEOPLE OF THE STATE OF NEW YORK,

- against-

Decision and Order

S.C.I. No. 99043/2013

ANTHONY CAMPBELL,

Defendant.
-- X
SETH L. MARVIN, A.J.S.C.

In papers dated December 17, 2013, defendant, through his attorney Richard Joselson, of The Legal Aid Society, moves to dismiss the sex offender risk level assessment (hereinafter "SORA") proceeding on the ground that the 2003 Virginia misdemeanor sexual battery offense of which he was convicted is not equivalent to any New York State offense for which SORA registration is required. On January 8, 2014, the People filed an affirmation in opposition. On January 28, 2014, defendant filed a reply affirmation.

According to the case summary prepared by the State of New York Board of Examiners of Sex Offenders (hereinafter "BOE"), defendant, who was 27 years old, approached the victim, who was 17 years old, and told her that he was interested in her friend. The victim knew defendant from "outside" and they had talked a few times outside near her house. *See* Case Summary. On April 30, 2003, defendant told the victim that he needed to talk to her. The victim told defendant to go to her house after her parents left. When defendant arrived at the victim's house, he told her that he was really interested in her. Defendant started kissing her and giving her hickeys. The victim told him to stop. Defendant then laid on top of her. He grabbed her breasts, butt and vagina through her clothes. After defendant got up, the victim walked over to the window. Thereafter, defendant left the victim's house. The incident occurred in Virginia. On May 1, 2003, the victim's father filed a report with Virginia's Chesapeake Police Department.

On July 17, 2003, defendant pleaded guilty to sexual battery (Virginia Code Ann. §18.2-67.4) and indecent exposure (Virginia Code Ann. §18.2-387). Defendant was sentenced to a suspended term of 12 months incarceration. According to the case summary, defendant is required to register as a sex offender in Virginia for the misdemeanor sexual battery conviction. Since defendant is currently residing in The Bronx, the BOE asserts that he is required to register as a sex offender in New York.

Correction Law §168-a(2)(d)(i) states that a person must register as a sex offender in New York when that person has a conviction of "an offense in any jurisdiction which includes all of the essential elements" of any New York Penal Law offense which requires sex offender registration. When the BOE finds that the two offenses cover the same conduct, the analysis need proceed no further for it will be evident that the foreign conviction is the equivalent of the registrable New York offense for SORA purposes. *Matter of North v. Bd. of Examiners of Sex Off. Of State of N.Y.*, 8 N.Y.3d 745, 753 (2007). In circumstances where the offenses overlap but the foreign offense also criminalizes conduct not covered under the New York offense, the BOE must review the conduct underlying the foreign conviction to determine if that conduct is, in fact, within the scope of the New York offense. If it is, the foreign conviction is a registrable offense under SORA's essential elements test. *Id.*

Defendant contends that the Virginia misdemeanor sexual battery offense to which he pleaded guilty is broader than any New York crime for which registration is required. Defendant asserts that his Virginia conviction does not share "all the essential elements" of a New York SORA crime for two reasons (defendant's memorandum of law, p. 2). First, defendant contends that the

Virginia offense, as defined by Virginia Code Ann. §18.2-67.4, criminalizes conduct accomplished by means of a "ruse."

Virginia Code Annotated §18.2-67.4 states, in relevant part, that "[a]n accused is guilty of sexual battery if he sexually abuses, as defined in § 18.2-67.10, (i) the complaining witness against the will of the complaining witness, by force, threat, intimidation, or ruse . . . ." Virginia Code Annotated § 18.2-67.10(6) defines sexual abuse as "an act committed with the intent to sexually molest, arouse, or gratify any person, where: (a) The accused intentionally touches the complaining witness's intimate parts or material directly covering such intimate parts . . . ." Defendant contends that no New York SORA offense criminalizes conduct accomplished through the use of a ruse.

Second, defendant claims that, under Virginia law, "sexual abuse" occurs not only when an offender acts with an intent to gratify the sexual desires of either party, but also when other intents are present. Virginia Code Ann. § 18.2-67.10(6). Defendant asserts that, in New York, however, "sexual contact," the corresponding term, occurs only when the contact at issue is for the purpose of "gratifying the sexual desire of either party." Penal Law § 130.00(3). Defendant moves to dismiss the SORA proceeding because he contends that the Virginia offense of which he was convicted is not equivalent to any New York offense for which SORA registration is required.

In opposing defendant's motion, the People contend that defendant's Virginia conviction is equivalent to second-degree sexual abuse (Penal Law §130.60[1]), which is a registerable offense. Penal Law § 130.60(1) states:

> A person is guilty of sexual abuse in the second degree when he . . . subjects another person to sexual contact and when such other person is:
>
> (1) Incapable of consent by reason of some factor other than being less than seventeen years old[.]

Penal Law §130.00(3) defines "sexual contact" as "any touching of the sexual or other intimate parts of a person for the purpose of gratifying sexual desire of either party. It includes the touching of the actor by the victim, as well as the touching of the victim by the actor, whether directly or through clothing . . . ."

A person is deemed incapable of consent when he is: (a) less than seventeen years old; or (b) mentally disabled; or (c) mentally incapacitated; or (d) physically helpless . . . . Penal Law §130.05(3).[1] "Physically helpless" means that a person is unconscious or for any other reason is physically unable to communicate unwillingness to an act. Penal Law §130.00(7).

The People assert that Penal Law § 130.60(1) contains all the "essential elements" of Virginia Code Ann. § 18.2-67.4, in that both statutes: (1) criminalize the act of sexual abuse committed without the complainant's consent; (2) essentially define sexual abuse as a touching of intimate parts, whether it be directly or through clothing, with the intent for sexual gratification; and (3) require the sexual abuse to be without the consent of the complaining witness and enumerate the manners in which there is no consent.

A comparison of the elements reveals that there is a significant overlap between the conduct criminalized in the analogous New York offense and the Virginia offense. The Virginia offense, however, also criminalizes conduct not covered under the analogous New York offense.

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[1]Under subsections (e) through (g), respectively, a person is incapable of consent when she is committed to the care and custody or supervision of the state department of corrections and community supervision or a hospital, committed to the care and custody of a local correctional facility, or committed to or placed with the office of children and family services and in residential care, and the actor is an employee of those agencies. Under subsections (h) and (i), respectively, a person is incapable of consent when she is a client or patient and the actor is a health care provider or mental health care provider, or a resident or inpatient of a residential facility operated, licensed or certified by the office of mental health or the office for people with developmental disabilities or the office of alcoholism and substance abuse services, and the actor is an employee of those agencies.

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As defendant points out, first, unlike the Virginia offense, no New York SORA offense criminalizes conduct accomplished through the use of a ruse. Additionally, defendant notes that, unlike New York, under Virginia law, "sexual abuse" occurs not only when an offender acts with an intent to gratify the sexual desires of either party, but also when other intents are present, such as intent to sexually molest or arouse. Accordingly, since, on the elements, the Virginia offense is not the equivalent of the New York offense, a review of the conduct underlying the Virginia conviction is necessary.

The People rely on the Chesapeake, Virginia police report to support their contention that defendant's conduct equates to second-degree sexual abuse. The police report, completed by the responding officer, C.L. Heckman, indicates the same information contained in the case summary prepared by the BOE. *See supra*, p. 1.

Defendant asserts that the information contained in the police report constitutes unreliable hearsay and, therefore, this Court should not consider it. It is clear from the police report that the victim provided the responding officer with the information contained in the report. As the Court of Appeals stated in *People v. Mingo*, 12 N.Y.3d 563, 574 (2009), hearsay is reliable for SORA purposes and, therefore, admissible if, based on the circumstances surrounding the development of the proof, a reasonable person would deem it trustworthy. Among the factors considered in evaluating the reliability of proffered hearsay evidence are the age of the conviction and the efforts made to locate relevant documents; whether the proof is corroborated either by the nature of the conviction or other evidence in the record; whether the declarant was under oath or was acting under a duty to accurately report, record or convey information; and whether the circumstances surrounding the making of the statement otherwise bear indicia of reliability. *Id.*

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In *People v. Balic*, 12 N.Y.3d 563, 573 (2009), a companion case to *Mingo*, Balic argued that the criminal complaint was unreliable because, although the police officer was under oath, the victim was not. Thus, Balic suggested that SORA courts could consider only sworn victim statements. The Court of Appeals rejected this argument and found the defendant's assertion to be inconsistent with the broad statutory language in Correction Law § 168-n(3), which directs the court to consider "any victim's statement." The Court of Appeals noted that courts in other jurisdictions with comparable regulatory schemes have similarly determined that victim statements can be relied on even if not made under oath. Specifically, the Court cited *Matter of C.A.*, 146 N.J. 71 (1996) and *Doe v. Sex Offender Registry Bd.*, 70 Mass.App.Ct. 309 (App. Ct., Suffolk 2007).

In *Matter of C.A.*, 146 N.J. at 98, the New Jersey Supreme Court held that the victim's statements recounted in police and medical reports constituted reliable hearsay because it was presumed that police officers and medical doctors accurately reported on the statements given to them. In *Doe*, 70 Mass.App.Ct. at 312, the Appeals Court of Massachusetts held that the hearing court did not err in relying on the victim's statement recounted in the police report.

Like the police officers in *Matter of C.A.* and *Doe*, here, the police officer completed the police report based on statements provided by the victim. Accordingly, the police report constitutes reliable hearsay and, as such, will be considered by this Court.

Based on the victim's statements contained in the police report, it is clear that defendant's conduct in Virginia is not equivalent to second-degree sexual abuse. There is nothing in the police report or the case summary to conclude that the victim was incapable of consent. The People cite to the definition of "lack of consent" contained in Penal Law §§ 130.05(2)(a) through (d) to support their contention that defendant's conduct constitutes sexual abuse in the second degree. Sexual

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abuse in the second degree, however, requires not only a lack of consent, but an incapacity to consent, as defined by Penal Law §§ 130.05(3)(a) through (i).

Neither the police report nor the case summary establishes the victim's incapacity to consent. The police report and case summary indicate that when defendant started kissing the victim, she told him to stop. The victim informed the police that defendant then "leaned over from a sitting position on the couch to laying on top of her . . . ." (Chesapeake police report: confidential supplement, p. 2). The victim indicated that she tried to get up, but defendant was "too big and overpowered her." *Id.* After grabbing her breasts, butt and vagina through her clothes, defendant got up. Thereafter, the victim got up, and defendant left her house. Under these circumstances, the People have not established that the victim was incapable of consent as defined by Penal Law §§ 130.05(3)(a) through (i).

Accordingly, since defendant's Virginia sexual battery offense of which he was convicted is not equivalent to New York's second-degree sexual abuse charge, he is not required to register as a sex offender in New York. Thus, the instant SORA proceeding is dismissed.

This constitutes the decision and order of the Court.

Dated: February 26, 2014
Bronx, New York

SETH L. MARVIN, A.J.S.C.

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